Shipping Costs: When the contract specifies "F.O.B. destination," the seller bears all costs to transport the goods to the specified destination. ("[W]hen the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (§ 36-2-503) . . .").

Risk of Loss: Risk of loss typically follows possession. In an FOB destination contract, risk of loss shifts to buyer upon delivery. S.C. Code § 36-2-319(1)(b). See also S.C. Code Ann. § 36-2-509(1)(b) & (3) (2003) (South Carolina Reporter's Comments) ("Subsection (1)(b) treats the risk of loss problem for 'destination contracts,' e.g., 'F.O.B., point of destination.' Again a result would be reached under this Commercial Code section similar to that under existing case law. The passage of title and thus risk of loss to buyer is delayed until the goods reach their destination. In accord, Matheson v. Southern Ry. Co., 79 SC 155, 60 SE 437 (1908). See 2 Williston, Sales, Section 280 (rev ed 1948). This is the same point which this Code section prescribes for the passage of risk to the buyer.") .

Title / Insurable Interest: "[I]f the contract requires delivery at destination, title passes on tender there." S.C. Code § 36-2-401(2)(b) (2003). Tender of delivery is governed by 36-2-503. In other words, once the State takes physical possession, the state has title to the goods. See S.C. Code § 36-2-501 (2003) (South Carolina Reporter's Comments) ("It has been held in a number of cases that legal title is not necessary in order to constitute an insurable interest, an equiable interest being sufficient. E.g., Scott v. Liverpool & London & Globe Ins. Co., 102 SC 115, 86 SE 484 (1915); Dunning v. Firemen's Ins. Co., 194 SC 98, 8 SE2d 318 (1940). In Mihous v. Globe & Rutgers Fire Ins. Co., 161 SC 96, 159 SE 506 (1931), it was held that a vendee of an executory contract of sale had an insurable interest in the property.")

Generally see S.C. Code Ann. § 36-2-401, -501, -503, -509(1)(b) & (3). The Law of Purchasing, Chapter 9, Risk of Loss and Shipping Terms (January 2000 Supp.)

B- 200,660, 81-1 CPD P 196

COMPTROLLER GENERAL
MATTER OF: CONTRA COSTA ELECTRIC, INC.:
MAR 16, 1981

DIGEST:

1. CONTRACT EXPERIENCE OF PROPOSED SUBCONTRACTOR MAY BE USED IN DETERMINING WHETHER BIDDER/PRIME CONTRACTOR MEETS SOLICITATION EXPERIENCE REQUIREMENT SINCE BIDDER WAS ALSO PRIME CONTRACTOR ON PREVIOUS SIMILAR CONTRACTS.

2. PROTESTER HAS NOT CARRIED BURDEN OF PROVING THAT AWARDEE'S BID WAS MATERIALLY UNBALANCED IN ORDER TO STAY WITHIN COST LIMITATION. PRICE PATTERN OF AWARDEE'S BID LEADS TO OPPOSITE CONCLUSION.

CONTRA COSTA ELECTRIC, INC., PROTESTS THE AWARD OF A CONTRACT TO JAY AND SAM CONSTRUCTION, INC., FOR THE REPAIR AND ALTERATION OF HEATING, VENTILATING AND AIR-CONDITIONING SYSTEMS AND FOR THE INSTALLATION OF ENERGY MONITORING AND CONTROL SYSTEMS IN VARIOUS BUILDINGS AT MCCLELLAN AIR FORCE BASE, CALIFORNIA. THE AWARD WAS MADE UNDER INVITATION FOR BIDS (IFB) NO. F04699-80-B0042, ISSUED BY THE AIR LOGISTICS CENTER, MCCLELLAN AIR FORCE BASE.

CONTRA COSTA, THE THIRD LOW BIDDER, CONTENDS THAT JAY AND SAM, THE LOW BIDDER, AND AMERICAN CONTRACTING ENGINEERS, THE SECOND LOW BIDDER, DO NOT MEET THE 2- YEAR SIMILAR EXPERIENCE REQUIREMENT CONTAINED IN THE IFB AND HAVE MATERIALLY UNBALANCED THEIR BIDS.

THE PROTEST IS DENIED.

CONTRACTOR EXPERIENCE REQUIREMENT

CONTRA COSTA ALLEGES THAT JAY AND SAM DOES NOT MEET THE FOLLOWING IFB PROVISION, ENTITLED 'QUALITY ASSURANCE, CONTRACTOR QUALIFICATION:'

'THE CONTRACTOR SHALL HAVE A 2 YEAR EXPERIENCE RECORD IN THE DESIGN AND INSTALLATION OF COMPUTERIZED BUILDING SYSTEMS SIMILAR IN PERFORMANCE TO THAT SPECIFIED HEREIN.'

THE DEPARTMENT OF THE AIR FORCE ADMITS THAT JAY AND SAM ALONE DOES NOT MEET THE REQUIREMENT, BUT ARGUES THAT IN CONJUNCTION WITH ITS PROPOSED SUBCONTRACTOR, JOHNSON CONTROLS, INC., JAY AND SAM DOES MEET THE REQUIREMENT. ACCORDING TO THE AIR FORCE, JAY AND SAM HAS BEEN THE PRIME CONTRACTOR WITH JOHNSON CONTROLS AS THE SUBCONTRACTOR ON PRIOR CONTRACTS MEETING THE TIME AND SIMILARITY REQUIREMENTS CONTAINED IN THE CLAUSE. THE AIR FORCE CONTENDS THAT IT IS PERMISSIBLE TO MEET THE EXPERIENCE REQUIREMENT IN THIS MANNER BECAUSE, EVEN THOUGH THE IFB USES THE TERM 'CONTRACTOR' THROUGHOUT THE SPECIFICATIONS, THERE IS NO PROHIBITION ON THE USE OF SUBCONTRACTORS. ALSO, DEFENSE ACQUISITION REGULATION SEC. 1-906(A) (DEFENSE ACQUISITION CIRCULAR NO. 76-22, FEBRUARY 22, 1980) PROVIDES THAT A SUBCONTRACTOR'S RESPONSIBILITY MAY BE CONSIDERED IN DETERMINING A PRIME CONTRACTOR'S RESPONSIBILITY. FINALLY, THE AIR FORCE ARGUES THAT OUR DECISION IN 39 COMP. GEN. 173 (1959) SPECIFICALLY PERMITS A PRIME CONTRACTOR TO MEET AN EXPERIENCE REQUIREMENT BY HAVING PREVIOUSLY PERFORMED THE NECESSARY WORK 'WITH ITS OWN ORGANIZATION OR BY USING THE SUBCONTRACTORS NOW PROPOSED.' ID. AT 176.

CONTRA COSTA POINTS OUT THAT IN 39 COMP. GEN. 173, SUPRA, THE SOLICITATION IN QUESTION

SPECIFICALLY PERMITTED SUBCONTRACTORS' EXPERIENCE TO BE CONSIDERED IN DETERMINING WHETHER THE BIDDER MET THE EXPERIENCE REQUIREMENT, WHILE HERE THE ENTIRE SOLICITATION AND THE EXPERIENCE CLAUSE MENTIONED ONLY THE CONTRACTOR. THEREFORE, THE PROTESTER ARGUES, THE SUBCONTRACTOR'S EXPERIENCE CANNOT BE CONSIDERED IN THIS CASE. CONTRA COSTA NOTES THAT AT THE BID PROTEST CONFERENCE HELD ON THIS CASE, THE AIR FORCE'S REPRESENTATIVE STATED THAT THE AIR FORCE INTENDED TO SEND A LETTER TO CONTRACTING PERSONNEL DIRECTING THAT FUTURE SOLICITATIONS NOT BE DRAFTED IN THIS MANNER. CONTRA COSTA ASSERTS THAT THIS CONSTITUTES AN ADMISSION THAT THE SOLICITATION CANNOT BE READ AS PERMITTING SUBCONTRACTORS' EXPERIENCE TO BE CONSIDERED.

GENERALLY, GAO WILL NOT REVIEW AFFIRMATIVE DETERMINATIONS OF BIDDERS' RESPONSIBILITY, WHICH INVOLVES SUCH MATTERS AS EXPERIENCE AND FINANCIAL CAPACITY. CENTRAL METAL PRODUCTS, 54 COMP. GEN. 66 (1974), 74-2 CPD 64. AN EXCEPTION TO THAT RULE IS WHEN THE SOLICITATION CONTAINS A 'DEFINITIVE RESPONSIBILITY CRITERION' WHICH ALLEGEDLY HAS NOT BEEN APPLIED. HAUGHTON ELEVATOR DIVISION, 55 COMP. GEN. 1051 (1976), 76-1 CPD 294. DEFINITIVE RESPONSIBILITY CRITERIA INVOLVE SPECIFIC AND OBJECTIVE FACTORS, SUCH AS SPECIFIC EXPERIENCE REQUIREMENTS. THE REQUIREMENT IN QUESTION HERE IS CLEARLY A DEFINITIVE RESPONSIBILITY CRITERION, APPROPRIATE FOR OUR REVIEW. NEITHER PARTY DISPUTES THIS. ALSO, THERE APPEARS TO BE NO DISPUTE THAT JAY AND SAM DO NOT MEET THE REQUIREMENT ALONE, BUT DO MEET THE REQUIREMENT IF THE EXPERIENCE OF JOHNSON CONTROLS, THE PROPOSED SUBCONTRACTOR, IS CONSIDERED.

THE NARROW ISSUE PRESENTED TO US IS WHETHER THE SOLICITATION PERMITS THE USE OF SUBCONTRACTORS AND, IF SO, WHETHER THE EXPERIENCE CLAUSE PERMITS THE USE OF SUBCONTRACTORS' EXPERIENCE IN DETERMINING THE BIDDER'S RESPONSIBILITY. THERE IS NO GENERAL PROHIBITION ON THE USE OF SUBCONTRACTORS TO PERFORM PORTIONS OF GOVERNMENT CONTRACTS. PRESENTATIONS SOUTH, INC., B-196099, MARCH 18, 1980, 80-1 CPD 209. IN THIS CASE, WE DO NOT THINK THAT THE USE OF THE WORD 'CONTRACTOR' THROUGHOUT THE SPECIFICATIONS CAN REASONABLY BE CONSTRUED AS PROHIBITING THE USE OF SUBCONTRACTORS, AND THERE IS NO SPECIFIC CLAUSE DOING SO. ALSO, THERE ARE NUMEROUS CLAUSES REFERRING TO SUBCONTRACTORS IN THE INSTRUCTIONS TO BIDDERS AND GENERAL PROVISIONS SECTIONS OF THE SOLICITATION. ADDITIONALLY, WE DO NOT THINK THAT A LETTER (IF ONE HAS IN FACT BEEN SENT) REQUESTING CONTRACTING ACTIVITIES TO SPECIFICALLY MENTION SUBCONTRACTORS IN FUTURE SOLICITATIONS IS NECESSARILY AN ADMISSION THAT THE SOLICITATION HERE DID NOT PERMIT SUBCONTRACTING OR THE CONSIDERATION OF SUBCONTRACTOR EXPERIENCE. RATHER, IT MAY WELL BE A GOOD-FAITH ATTEMPT TO RESPOND TO THE PROTEST BY MAKING THE REQUIREMENT MORE CLEAR.

OUR DECISION IN 39 COMP. GEN. 173, SUPRA, SANCTIONS THE USE OF PROPOSED SUBCONTRACTORS' EXPERIENCE IN DETERMINING A BIDDER/PRIME CONTRACTOR'S COMPLIANCE WITH AN EXPERIENCE CLAUSE, WHERE THE BIDDER WAS ALSO THE PRIME CONTRACTOR ON THE CONTRACTS WHICH ARE BEING RELIED ON TO MEET THE EXPERIENCE REQUIREMENT. WHILE, AS CONTRA COSTA POINTS OUT, THE CLAUSE IN THAT CASE SPECIFICALLY PROVIDED THAT SUBCONTRACTORS' EXPERIENCE COULD BE CONSIDERED, THE DECISION WAS NOT BASED ON THAT FACTOR.

IN INTERPRETING THE CLAUSE IN QUESTION, WE DISCUSSED THE EXPERIENCE CLAUSE FORMERLY USED BY THE AGENCY, WHICH:

'*** REFERRED ONLY TO THE BIDDER HIMSELF, AND NO MENTION WAS MADE OF THE USE, QUALIFICATIONS, OR EXPERIENCE OF SUBCONTRACTORS. *** PRESUMABLY THIS WAS BECAUSE FULL RESPONSIBILITY FOR SATISFACTORY PERFORMANCE WOULD BE PLACED UPON THE PRIME CONTRACTOR, AND BECAUSE SATISFACTORY PERFORMANCE OF PRIOR CONTRACTS, WHETHER ACCOMPLISHED SOLELY BY USE OF THE PRIME CONTRACTOR'S ORGANIZATION OR WITH THE AID OF SUBCONTRACTORS, WOULD BE INDICATIVE OF THE PRIME CONTRACTOR'S COMPETENCY AND RESPONSIBILITY.' ID. AT 176.

WE THEN STATED THAT THE CLAUSE IN QUESTION COULD NOT BE INTERPRETED AS A RELAXATION OF THE REQUIREMENTS OF THE FORMER CLAUSE. IN SUM, THE RULE IS THAT THE CONTRACT EXPERIENCE OF A PROPOSED SUBCONTRACTOR MAY BE USED IN DETERMINING WHETHER THE BIDDER MEETS AN EXPERIENCE REQUIREMENT IF THE BIDDER WAS THE PRIME CONTRACTOR ON THOSE PREVIOUS SIMILAR CONTRACTS, WHETHER OR NOT THE EXPERIENCE REQUIREMENT SPECIFICALLY MENTIONS SUBCONTRACTOR EXPERIENCE.

HERE, JAY AND SAM WAS THE PRIME CONTRACTOR AND JOHNSON CONTROLS THE SUBCONTRACTOR ON THE CONTRACTS RELIED UPON TO MEET THE EXPERIENCE REQUIREMENT. THEREFORE, JAY AND SAM APPEARS TO HAVE SATISFIED THE REQUIREMENT.

UNBALANCED BID

THE IFB REQUIRED SEPARATE LUMP-SUM BIDS FOR ITEMS 0001AA AND 0001AB. THE SOLICITATION ALSO CONTAINED A NOTICE THAT THE BID PRICE FOR ITEM 0001AB WAS STATUTORILY LIMITED TO $100,000, AND THAT A BID WHICH WAS MATERIALLY UNBALANCED FOR THE PURPOSE OF BRINGING THE AFFECTED ITEM WITHIN THE LIMITATION 'MAY BE REJECTED.' JAY AND SAM BID $99,611 FOR ITEM 0001AB AND $133,603 FOR ITEM 0001AA. CONTRA COSTA BID $98,607 FOR ITEM 0001AB AND $224,835 FOR 0001AA.

CONTRA COSTA ALLEGES THAT JAY AND SAM MUST HAVE UNBALANCED ITS BID BY SHIFTING APPROXIMATELY $45,000 IN INSTALLATION COSTS ON ITEM 0001AB TO ITEM 0001AA, IN CONTRAVENTION OF THE COST LIMITATION CLAUSE. IN SUPPORT OF THIS ALLEGATION, THE PROTESTER ASSERTS THAT THE EQUIPMENT TO BE PROVIDED BY JAY AND SAM UNDER ITEM 0001AB COSTS APPROXIMATELY $85,000 AND THAT INSTALLATION AND MECHANICAL COSTS ARE APPROXIMATELY $60,000. THEREFORE, CONTRA COSTA ARGUES, JAY AND SAM MUST HAVE SHIFTED THOSE EXCESS COSTS TO ITEM 0001AA. CONTRA COSTA HAS PROVIDED AN AFFIDAVIT SHOWING ITS OWN COST BREAKDOWN AND STATING THAT IT COULD MEET THE COST LIMITATION ONLY BY USING ANOTHER MANUFACTURER'S EQUIPMENT.

CONTRA COSTA HAS NOT CARRIED ITS BURDEN OF PROVING THAT JAY AND SAM SHIFTED COSTS FROM ITEM 0001AB TO 0001AA. THERE ARE POSSIBLE REASONS OTHER THAN SHIFTING COSTS TO EXPLAIN JAY AND SAM'S ABILITY TO STAY WITHIN THE COST LIMITATION, INCLUDING A WILLINGNESS TO TAKE A LOSS ON THAT ITEM WITHOUT MAKING IT UP ON THE OTHER ITEM. CERTAINLY, JAY AND SAM'S LOW PRICE FOR ITEM 0001AA, IN COMPARISON TO CONTRA COSTA'S HIGH PRICE, SUPPORTS THE CONCLUSION THAT COSTS WERE NOT SHIFTED.

SINCE WE HAVE CONCLUDED THAT JAY AND SAM, THE LOW BIDDER, MET THE EXPERIENCE REQUIREMENT AND DID NOT SUBMIT A MATERIALLY UNBALANCED BID, AWARD TO IT WAS PROPER.

THEREFORE, WE NEED NOT CONSIDER THE ALLEGATIONS WITH REGARD TO AMERICAN CONTRACTING ENGINEERS, THE SECOND LOW BIDDER.

B- 200,660, 81-1 CPD P 196

69 Comp. Gen. 359, B- 237,938, 90-1 CPD P 347

COMPTROLLER GENERAL
Matter of: Hardie-Tynes Manufacturing Company
April 2, 1990

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.
Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for IMPSA-International, Inc., an interested party.
Justin P. Patterson, Esq., Department of the Interior, for the agency.
Mary G. Curcio, Esq., Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

2. Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

DECISION

Hardie-Tynes Manufacturing Company protests the award of a contract for flow gates under invitation for bids (IFB) No. 9-SI-30-07760/DS-7800, to IMPSA International, Inc. (IMPSA-International), by the Bureau of Reclamation, Department of the Interior. Hardie-Tynes alleges that IMPSA-International submitted a nonresponsive bid and is a nonresponsible bidder.

We deny the protest.

Issued on July 28, 1989, the IFB solicited bids to design, furnish and deliver flow gates for the Roosevelt Dam, Salt River Project, Arizona, and the Hoover Dam, Boulder Canyon Project, Arizona-Nevada. Section L-22 of the IFB provided:

"The bidder shall have experience in the manufacture of high-head slide gates and hydraulic hoists and in this respect shall have had equipment of similar complexity to that required by this solicitation/specifications in satisfactory operation for not less than 5 years."

At bid opening on September 28, the Bureau received six bids; IMPSA-International submitted the low bid of $3,430,012, and Hardie-Tynes submitted the second-low bid of $4,730,976. IMPSA-International, a Pennsylvania corporation with no manufacturing facility, stated in its bid that the gates would be manufactured in Argentina at the manufacturing facilities of its parent corporation, Industrias Metalurgicas Pescarmona S.A. (IMPSA-Argentina).

On October 5, Hardie-Tynes protested to the Bureau that IMPSA-International was ineligible for award because the firm did not meet the 5-year manufacturing experience requirement set out in section L-22 and was not a manufacturer for purposes of the Walsh-Healey Public Contracts Act. 41 U.S.C. ss 35-45 (1982 and Supp. V 1987). The Bureau initially agreed that IMPSA-International was ineligible for award because it was not a manufacturer under the Act. Subsequently, IMPSA-International submitted three corporate documents (a power of attorney and agency agreement, a special power of attorney, and a document entitled "unanimous written consent of sole shareholder in lieu of annual meeting") to show that IMPSA-International represented IMPSA-Argentina and was authorized to bind IMPSA-Argentina in contracts for projects in the United States. The Bureau then determined that, because the equipment would be manufactured in Argentina and shipped directly to the United States government installations, the Walsh-Healey Public Contracts Act was not applicable.

On November 27, the Bureau awarded the contract to IMPSA-International. Hardie-Tynes filed its protest with our Office on December 1.

Hardie-Tynes first alleges that the bid submitted by IMPSA-International is nonresponsive because it does not contain an unequivocal commitment to perform the contract. Specifically, Hardie-Tynes argues that, because IMPSA-International relied on the manufacturing experience of IMPSA-Argentina, it could have chosen to avoid the contract by not disclosing its relationship with IMPSA-Argentina. Hardie-Tynes also argues that the bid is nonresponsive because it is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, and, therefore, it is not clear which firm is obligated to perform the contract.

The test for responsiveness is whether a bid as submitted represents an unequivocal commitment to provide the requested supplies or services at a firm, fixed-price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation, the bid is responsive. Haz-Tad, Inc., et al., 68 Comp.Gen. 92 (1988), 88-2 CPD p 486. The determination as to whether a bid is responsive must be based solely on the bid documents as they appear at the time of bid opening. Id.

Here, the bid was submitted in the name of IMPSA-International and there was nothing on its face to indicate that IMPSA-International would not perform in accordance with the terms of the solicitation. Consequently, the bid as submitted was responsive. In examining the responsiveness of the bid, it would have been improper for the contracting officer to have relied on post-bid opening submissions concerning whether IMPSA-International met the solicitation requirement for manufacturing experience since, as explained below, that requirement relates to responsibility and has no bearing on the responsiveness of the bid. Insofar as Hardie-Tynes is arguing that the bid is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, it is clear from the bid itself that IMPSA-International was the bidder and that, even though the flow gates will be manufactured by IMPSA-Argentina, IMPSA-International is obligated to supply the flow gates to the government under the contract.

Furthermore, we find unpersuasive Hardie-Tynes' argument that IMPSA-International could have chosen not to disclose its corporate affiliation with IMPSA-Argentina in order to avoid being awarded the contract. IMPSA-International's bid clearly disclosed the only critical relationship between the two firms--that is, that IMPSA-Argentina would be doing the actual manufacturing for IMPSA-International, which had agreed to furnish the gates to the government. Theoretically, any bidder could attempt to be found nonresponsible by not cooperating with contracting officials who ask for relevant financial or corporate documents during the course of a responsibility determination. However, here, IMPSA-International cooperated fully by furnishing the corporate documents and, once found responsible and awarded the contract, was bound to perform the work.

Hardie-Tynes also protests that IMPSA-International, a Pennsylvania corporation with approximately 12 employees and no manufacturing facilities, is not a responsible bidder because it does not meet the manufacturing experience requirement of the IFB. Hardie-Tynes contends that while IMPSA-Argentina, the parent corporation, is a manufacturing company, IMPSA-International cannot rely on the experience of IMPSA-Argentina to meet the 5-year manufacturing experience requirement. To support this position Hardie-Tynes cites Federal Acquisition Regulation (FAR) s 9.104-3(d), which provides that affiliated concerns are normally considered separate entities in determining whether a contractor meets applicable standards for responsibility. Hardie-Tynes also argues that while the experience of a nonbidding entity can be used to determine the responsibility of a bidding party in appropriate circumstances, the bid must first establish that the nonbidding entity whose experience is being relied upon is committed to perform the contract. Hardie-Tynes contends that the corporate documents submitted by IMPSA-International do not establish that IMPSA-Argentina made any commitment to manufacture flow gates for IMPSA-International when IMPSA-International acts in its own name; thus, Hardie-Tynes argues that the documents provide no basis for the Bureau to rely upon the experience of IMPSA-Argentina to find IMPSA-International responsible.

The Bureau agrees that IMPSA-International alone does not meet the experience requirement. The Bureau argues, however, that IMPSA-International properly may satisfy the 5-year experience requirement based on the manufacturing experience of its parent corporation, IMPSA-Argentina. According to the Bureau, it determined from the documents submitted by IMPSA-International--the unanimous written consent of sole shareholder in lieu of annual meeting, the special power of attorney, and the power of attorney and agency agreement--that IMPSA-Argentina was bound to manufacture the flow gates which IMPSA-International agreed to provide under the contract.

The Bureau further argues that the FAR does not prohibit using a parent corporation's experience to determine that a subsidiary corporation is responsible. In this connection, the Bureau cites FAR s 9.104-1, which provides in part that to

be responsible, a prospective contractor must have the necessary experience or the ability to obtain it, and the necessary production facilities or the ability to obtain them. The Bureau concludes that it properly found IMPSA-International responsible based on the experience of IMPSA-Argentina, because the corporate documents provided to the Bureau by IMPSA-International clearly showed that IMPSA-International had the ability to obtain both the required manufacturing experience and facilities from the parent corporation.

Our Office does not generally review affirmative responsibility determinations since a contracting agency's determination that a particular bidder or offeror is responsible is based in large measure on subjective judgments. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD p 128. One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's or an offeror's ability to perform the contract. Id. A solicitation requirement that the prospective contractor have a specified number of years of experience in a particular area is a definitive responsibility criterion. DJ Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD p 59. Where an allegation is made that definitive responsibility criteria have not been satisfied, the scope of our review is limited to ascertaining whether sufficient evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criteria have been met. Id.
In the present case the parties agree that IMPSA-International does not meet the experience requirement on its own, nor is there any dispute that IMPSA-Argentina does meet the experience requirement. The issue for resolution thus is whether IMPSA-International properly may be found responsible by considering the manufacturing experience of IMPSA-Argentina.

The experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prime contractor-bidder. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, supra; Allen-Sherman-Hoff Co., B-231552, Aug. 4, 1988, 88-2 CPD p 116; BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD p 309. We see little difference in this situation, where a subsidiary corporation is relying on its parent corporation to perform the work in question. See Unison Transformer Servs., Inc., 68 Comp.Gen. 74 (1988), 88-2 CPD p 471 (in performing a technical evaluation under a negotiated procurement, the procuring agency may consider the experience of a parent company where the offeror's subsidiary company represents that the resources of the parent company will be available to it). Accordingly, as IMPSA-International represented in its bid that the manufacturing would be performed by IMPSA-Argentina at the facilities in Argentina, we believe the Bureau properly considered IMPSA-Argentina's experience in determining that IMPSA-International met the experience requirement.

In reaching this conclusion, we note that, contrary to Hardie-Tynes' position, evidence of a firm commitment from the subcontractor to the prime contractor is not a prerequisite to considering the subcontractor's experience in determining that the prime contractor is responsible. See Allen-Sherman-Hoff Co., B- 231552, supra; Contra Costa Elec., Inc.--Reconsideration, B-200660.2, May 19, 1981, 81-1 CPD p 381. Nevertheless, from IMPSA-International's bid and the corporate documents submitted to the Bureau, it is clear that IMPSA-Argentina was committed to IMPSA-International to manufacture the flow gates. The power of attorney and agency agreement, and the unanimous written consent of the sole shareholder in lieu of an annual meeting, give IMPSA-International the power to do all things necessary, and to execute all agreements and documents in the name of IMPSA-Argentina which IMPSA-International deems necessary or advisable, in order to submit bids for projects in the United States. In addition, the special power of attorney gives IMPSA-International's president the power to sign contracts of any kind on behalf of IMPSA-Argentina. Thus, IMPSA-International had the authority to commit IMPSA-Argentina to manufacture the flow gates, and, in fact, indicated its intention to do so by specifying in its bid that the flow gates would be manufactured by its parent.

Finally, we do not agree that FAR s 9.104-3(d) precludes a contracting agency from considering the experience of a parent corporation to find a subsidiary corporation responsible. While the provision does state that affiliated concerns are normally considered separate entities in determining whether the firm that is to perform meets the applicable standards of responsibility, it does not provide that a contracting agency may never rely on an affiliate to find a prospective contractor responsible. In our view, the provision would preclude using an affiliate's experience simply because it was an affiliate. However, where, as here, the bidder represents that the parent-affiliate will be performing the contract, we think the affiliate's experience properly may be considered. See FAR s 9.104-3(b), which recognizes that a contractor may be found responsible through its own resources or those of a subcontractor or by otherwise demonstrating that it has the ability to obtain the needed resources.
The protest is denied.
James F. Hinchman
General Counsel

B- 224,267, 86-2 CPD P 457

COMPTROLLER GENERAL
Matter of: Hettich GmbH and Co. KG
October 24, 1986

DIGEST

1. Request for proposals provisions that high pressure steam boiler services be performed by certified employees that are merely a part of the general specifications concerning how and by whom the work is to be accomplished do not establish a precondition to award and therefore are contract performance requirements and not definitive responsibility criteria.
2. Where protest on its face is without legal merit, no useful purpose would be served by holding a bid protest conference.

DECISION

Hettich GmbH and Co. KG (Hettich) protests the award of a contract to PAE GmbH (PAE) under request for proposals (RFP) No. DAJA37-86-R-0675, issued by the U.S. Army Contracting Agency, Europe, for nonpersonal services consisting of the operation, maintenance and repair of high pressure steam boilers and similar systems at locations in West Germany.

We dismiss the protest.

The RFP, in Section L-8a, provided that award would be made to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price, and other factors specified in the solicitation, considered. [FN1] However, while the RFP contained detailed specifications for performing the work, it did not contemplate the submission of technical proposals and did not specify any other evaluation factors. Thus, the basis for award was essentially price alone among firms found to be responsible.

Section H-9 of the RFP, entitled "Required Employee Qualifications," provided that "first-line boiler plant supervisors," responsible for the operation of high pressure systems, must be trained and certified by "Technische Ueberwachungsverein," a German quasi-governmental licensing organization. That clause also required that the successful contractor furnish evidence of compliance with this requirement to the contracting officer within 30 days after commencement of performance of the services. Further, Section C-6 of the RFP's Statement of Work, entitled "Applicable Regulations, Manuals, Specifications and Forms," incorporated into the solicitation several German specifications, forms, and publications, with which the successful contractor was required to abide by. One such specification is "TRD 601," which, in English, is entitled "General Instruction for the User of High Pressure Steam Heating Boilers." According to the protester, TRD 601 sets forth the training and testing requirements that must be satisfied for an individual employee to be certified as qualified to operate high pressure boilers. The protester further states that under TRD 601, certification and training is provided to personnel in the name of their employer and that without properly certified personnel, German authorities will not permit the operation of high pressure boilers. The protester is the incumbent contractor and has such certified employees on its staff.

Initial proposals were received by the Army on August 18, 1986 and award was made on September 24, 1986 with performance scheduled to begin on October 1, 1986. According to the protester, at a preperformance conference held on September 29, 1986, PAE informed the contracting officer's representative that while PAE knew that the solicitation required that certified personnel operate high pressure boilers as an essential element of contract performance, PAE had failed to obtain the necessary qualified personnel and would not be able to perform the contract unless PAE obtained the qualified personnel currently employed by the protester. In a telex dated September 29, the protester advised the contracting officer that its certified employees were employed under legally enforceable contracts and that the protester would not permit these employees to join PAE. The protester also states that on October 1, 1986, the first scheduled date of contract performance, PAE did not have qualified personnel on site and that therefore properly certified U.S. Army personnel were required to be present. Hettich contends that Sections H-9 and C-6 of the RFP established definitive criteria of responsibility and that by not having certified personnel available as of October 1, 1986, the performance commencement date, PAE "failed to satisfy such responsibility criteria and should not be permitted to retain the contract."

Hettich argues that definitive criteria are here involved because the training and certification requirements for employees do not involve subjective judgments but are "objective, concrete, and verifiable criteria." Hettich concludes

that PAE is nonresponsible and that therefore the contract awarded to PAE should be terminated and instead awarded to the protester as the low, responsible offeror.

Since Hettich is questioning PAE's responsibility, the issue is whether or not the provisions of solicitation Sections H-9 and C-6 constitute definitive criteria of responsibility. It has been our policy not to review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of contracting officials, Central Metal Products, Inc., 54 Comp.Gen. 66 (1974), 74-2 CPD p 64, or where definitive criteria in the solicitation have not been met. Yardney Electric Corp., 54 Comp.Gen. 509 (1974), 74-2 CPD p 376; Satellite Services, Inc., B-219679, Aug. 23, 1985, 85-2 CPD p 224.

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring an offeror's ability to perform the contract; these special standards establish a precondition to award. Military Services, Inc. of Georgia, B-221384, April 30, 1986, 86-1 CPD p 423; Caelter Industries, Inc., B-203418, March 22, 1982, 82-1 CPD p 265. Definitive responsibility criteria limit the class of offerors to those meeting specified qualitative and quantitative qualifications that the agency determines are necessary for adequate contract performance. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD p 403. Thus, definitive responsibility criteria involve a bidder's eligibility for award and not its performance obligations under the contract. J.A. Jones Construction Co., B-219632, Dec. 9, 1985, 85-2 CPD p 637; Jack Roach Cadillac--Request for Reconsideration, B-200847.3, Aug. 28, 1981, 81-2 CPD p 183.

In a strikingly similar case, Johnson Controls, Inc., B-200466, Feb. 20, 1981, 81-1 CPD p 120, the solicitation required that service personnel employed by the successful contractor for the repair and maintenance of a highly complex energy management and control system "be certified by the manufacturer's representative to be qualified to maintain the completely installed ... system." We found that this provision did not constitute a definitive responsibility criterion. We stated that such provisions, which state how and by whom the work is to be accomplished, are performance requirements and are to be distinguished from requirements which are preconditions of award.

Here, the protester has not referred us to any RFP provision, and we have found none, which requires offerors to establish their specific qualifications in the area of boiler operations prior to award and as a prerequisite to award. Indeed, the protester's principal basis for protest rests upon post-award statements by the awardee that, without access to trained Hettich employees, it would be unable to secure the necessary certified personnel with which to perform the work in accordance with the terms of the contract. In our view, the cited RFP provisions are merely part of the general specifications concerning performance (how and by whom the work is to be accomplished) and do not establish a precondition to award. See Power Testing, Inc., B-197190, July 28, 1980, 80-2 CPD p 72.

In a supplemental submission filed by the protester, Hettich alleges that during a preproposal conference the contracting officer's representative orally informed offerors that no award would be made to any firm unable to comply with this "licensing requirement," and that this affected its bid pricing. Although the meaning of this statement is not altogether clear, we think the only reasonable interpretation of it is that the ability of the proposed awardee to obtain the necessary qualified employees with which to perform the contract would be considered before an affirmative responsibility determination would be made. Thus, the statement should have been taken as no more than an indication that the specifications would be enforced.

By submitting a proposal that took no exception to the terms of the RFP, PAE obligated itself to provide qualified boiler operators who meet the solicitation's requirements. Whether PAE could be expected to meet those obligations was for the contracting officer to determine in his overall determination as to PAE's responsibility. Moreover, whether PAE actually does perform under its contract with employees possessing the credentials and training required by the RFP is a matter of contract administration which we do not review. 4 C.F.R. s 21.3(f)(1) (1986).

Accordingly, we find that Hettich has not stated a valid basis of protest, and we dismiss the protest pursuant to our Bid Protest Regulations, 4 C.F.R. s 21.3(f), without requesting a report from the agency. In view of this dismissal, we also find that the conference Hettich has requested would serve no useful purpose. Cushman Electronics, Inc., B-207972, Aug. 5, 1982, 82-2 CPD p 110. Finally, since Hettich's protest is without legal merit, its request for reimbursement of the costs and fees of filing and pursuing its protest is disallowed. R.S. Data Systems, 65 Comp.Gen. 74 (1985), 85-2 CPD p 588.

The protest is dismissed.

Ronald Berger
Deputy Associate General Counsel

FN1 For reasons that are not apparent, the RFP, in Section M-2, entitled "Award," also contained a second, duplicative clause with essentially similar evaluation factors for award.

B- 224,267, 86-2 CPD P 457

36 Comp. Gen. 673, B- 130,910

COMPTROLLER GENERAL
TO THE NELLO L. TEER COMPANY
MARCH 26, 1957

BIDDERS - QUALIFICATIONS - EXPERIENCE - RECENTLY ESTABLISHED CORPORATIONS AND JOINT VENTURERS

IN EVALUATION OF THE EXPERIENCE OF SEVERAL BIDDERS FOR A ROAD CONSTRUCTION CONTRACT, A RECENTLY FORMED JOINT VENTURE AND A RECENTLY ESTABLISHED CORPORATION MAY BE CONSIDERED AS MEETING THE EXPERIENCE QUALIFICATION ON THE BASIS OF PAST CONSTRUCTION EXPERIENCE OF ONE OF THE JOINT VENTURERS AND THE PREVIOUS CONSTRUCTION EXPERIENCE OF ONE OR MORE OF THE CORPORATION'S PRINCIPAL OFFICERS WHO OWN OR CONTROL MOST OF THE CORPORATE STOCK OR GUARANTEE THE CORPORATION'S FINANCIAL OBLIGATIONS.

REFERENCE IS MADE TO YOUR PROTEST AGAINST FAVORABLE CONSIDERATION OF EITHER OF THE TWO LOWEST BIDS RECEIVED UNDER AN INVITATION FOR BIDS ISSUED ON FEBRUARY 8, 1957, BY THE DEPARTMENT OF COMMERCE, BUREAU OF PUBLIC ROADS, FOR ROAD CONSTRUCTION WORK DESCRIBED AS NICARAGUA PROJECT 8-A, INTER-AMERICAN HIGHWAY FROM SEBACO TO CONDEGA, REPUBLIC OF NICARAGUA.

YOUR PROTEST IS BASED UPON THE PROVISION IN THE INVITATION THAT 'BIDS WILL BE CONSIDERED ONLY FROM UNITED STATES OR NICARAGUA FIRMS WITH A SATISFACTORY PERFORMANCE RECORD ON HIGHWAY CONSTRUCTION IN THE UNITED STATES OR NICARAGUA.' YOUR COMPANY WAS THE THIRD LOWEST BIDDER ON THE BASIS OF COMPLETION OF THE PROJECT BY JUNE 30, 1959. THE SECOND LOWEST BID WAS SUBMITTED BY A JOINT VENTURE CONSISTING OF A GUATEMALAN FIRM AND JAMES STEWART AND COMPANY, INC. THE LOWEST BID WAS SUBMITTED BY THOMPSON-1CORNWALL, INC.

THE BUREAU OF PUBLIC ROADS HAS REPORTED, WITH REFERENCE TO JAMES STEWART AND COMPANY, INC., THAT ONE OF THE JOINT VENTURERS HAS PERFORMED A LARGE VOLUME OF HIGHWAY WORK SINCE 1937. BY LETTER DATED MARCH 15, 1957, THAT COMPANY ADVISED THE BUREAU WITH RESPECT TO YOUR PROTEST THAT IT HAS PERFORMED ALL TYPES OF INDUSTRIAL CONSTRUCTION, INCLUDING FACTORIES, OFFICE BUILDINGS, BANKS, HARBOR DEVELOPMENTS, PUBLIC HIGHWAYS, AND MILITARY INSTALLATIONS AND BASES. LISTED IN THE LETTER AS PREVIOUS ROAD WORK PERFORMED BY THE CORPORATION ARE: WEST SIDE HIGHWAY, NEW YORK CITY, PARK AVENUE OVER NEW YORK CENTRAL TRACKS, NEW YORK CITY; BALTIMORE-1WASHINGTON EXPRESS HIGHWAY; AND ROAD WORK IN CONJUNCTION WITH UNITED STATES NAVAL AIR STATION, TRINIDAD, B.W.I. THUS, IT IS APPARENT THAT THERE EXISTS NO SUBSTANTIAL BASIS FOR YOUR PROTEST AGAINST ANY AWARD TO THE SECOND LOWEST BIDDER.

DATA SUPPLIED BY THOMPSON-1CORNWALL, INC., SHOWS THAT ON APRIL 20, 1950, THE MACCO PAN-PACIFIC COMPANY WAS INCORPORATED IN THE STATE OF NEVADA, AND THAT THE NAME OF THIS CORPORATION WAS CHANGED ON **674 AUGUST 12, 1954, TO THOMPSON-1CORNWALL, INC. IT HAS BEEN ALLEGED THAT THE ORIGIN OF THOMPSON-1CORNWALL, INC., STEMS DIRECTLY FROM THE PARTNERSHIP OF CHARLES AND GEORGE K. THOMPSON WHICH WAS FORMED IN 1916 FOR THE PURPOSE OF ENTERING INTO THE GENERAL CONTRACTING BUSINESS IN THE MID-WESTERN PART OF THE UNITED STATES. A BROCHURE ENTITLED ' CONTRACTS COMPLETED BY THOMPSON-1CORNWALL 1916 THROUGH 1954,' LISTS A NUMBER OF CONSTRUCTION PROJECTS, INCLUDING THE CONSTRUCTION OF HIGHWAYS AND BRIDGES IN THE UNITED STATES, THE CANAL ZONE, THE REPUBLIC OF PANAMA, PUERTO RICO, AND SOUTH AMERICA. THE BUREAU OF PUBLIC ROADS IS SHOWN AS A CONTRACTOR FOR SOME OF THE HIGHWAY WORK IN THE UNITED STATES.

IN A LETTER OF MARCH 19, 1957, YOU INDICATED THAT IT WAS YOUR UNDERSTANDING THAT THOMPSON-1CORNWALL, INC., HAS NEVER AS A CORPORATE ENTITY PERFORMED HIGHWAY CONSTRUCTION WORK IN THE UNITED STATES OR NICARAGUA. WE ARE ADVISED THAT SINCE MAY

1954 THE STOCK OF THOMPSON- CORNWALL, INC., IS JOINTLY AND EQUALLY OWNED BY R. C. THOMPSON AND F. E. CORNWALL, AND THAT ALL OF THE OBLIGATIONS OF THE CORPORATION ARE PRESENTLY GUARANTEED BY GEORGE K. THOMPSON AS WELL AS BY R. C. THOMPSON AND F. E. CORNWALL. GEORGE K. THOMPSON AND HIS SON, R. C. THOMPSON, APPEAR TO HAVE HAD A CONSIDERABLE AMOUNT OF EXPERIENCE IN THE CONSTRUCTION OF HIGHWAYS IN THE UNITED STATES, PARTICULARLY IN CONNECTION WITH CONTRACTS PERFORMED BY THE THOMPSON-1MARKHAM CO., WHICH PARTNERSHIP CONSTRUCTED HIGHWAYS, TUNNELS, AIRPORTS AND BUILDINGS IN THE UNITED STATES DURING THE YEARS 1936 TO 1943. BEFORE THAT TIME GEORGE K. THOMPSON WAS A PARTNER WITH HIS BROTHER, CHARLES THOMPSON, IN THE CONTRACTING BUSINESS AND OPERATED IN THE WESTERN STATES ON DRAINAGE AND BRIDGES, HIGHWAYS AND TUNNEL CONSTRUCTION. GEORGE K. THOMPSON IS NOW ONE OF THE VICE PRESIDENTS OF THOMPSON-1CORNWALL, INC., AND HIS SON, R. C. THOMPSON, IS THE PRESIDENT OF THE CORPORATION.

WE DO NOT BELIEVE IT WOULD BE IMPROPER IN EVALUATING THE EXPERIENCE OF A CORPORATION TO CONSIDER THE EXPERIENCE OF ONE OR MORE OF ITS PRINCIPAL OFFICERS WHO OWN OR CONTROL MOST OF THE CORPORATE STOCK OR GUARANTEE THE CORPORATION'S FINANCIAL OBLIGATIONS. NOR DOES IT APPEAR UNUSUAL FOR A CORPORATION TO CLAIM THAT IT HAS PERFORMED WORK WHICH HAS ACTUALLY BEEN PERFORMED BY INDIVIDUALS OR PREDECESSOR FIRMS BEFORE THE DATE ON WHICH THE CORPORATION WAS FORMED. IT IS INTERESTING TO NOTE IN THIS CONNECTION THAT JAMES STEWART AND COMPANY, INC., IN ITS LETTER OF MARCH 15, 1957, REFERS TO ITS INCORPORATION IN 1913 BUT FURTHER STATES THAT ' THIS ORGANIZATION HAS BEEN IN THE GENERAL CONTRACTING BUSINESS FOR OVER 110 YEARS AND HAS PERFORMED CONSTRUCTION WORK IN EVERY SECTOR OF THE UNITED STATES AS WELL AS IN SOUTH AMERICA, EUROPE AND ASIA.'

UNDER THESE CIRCUMSTANCES, WE DO NOT FEEL JUSTIFIED IN INTERPOSING ANY OBJECTION TO CONSIDERATION OF THE TWO LOWEST BIDS RECEIVED ON NICARAGUA PROJECT 8-A.

4. Waters lawns and shrubs; fertilizes lawns and shrubs.

5. Plant seeds, shrubs, flowers and trees.

6. Performs related duties.

7. Must be capable of lifting weights of 50-100 pounds.

8. Must possess physical abilities and mobility to perform above tasks. Same for visual acuity.

C. GENERAL MAINTENANCE DUTIES

1. Performs routine maintenance and repair tasks under the supervision of skilled tradesmen.

2. Cleans work area; keeps workers supplied with materials, tools and equipment.

3. Delivers men to job site; loads and unloads supplies and equipment from service trucks.

D. PARKING ATTENDANT DUTIES

1. Drives state owned vehicles and equipment to patrol assigned parking areas, issuing parking citations and towing vehicles not displaying the proper state decals. Must be able to operate two-way radios and drive a golf cart.

2. Opens and secures the McEachern Parking Facility and Dennis Building. Provides assistance to patrons and general public with all parking related problems.

3. Monitors parking areas and facilities to insure that traffic and parking signs are properly posted. Drives state owned vehicles and walks stairs to survey lighting and maintenance of parking facilities and stairwells to insure proper levels of safety and maintenance.

4. Accommodate special parking needs such as visiting dignitaries, board meeting and special events.

5. Deliver packages and reports to agencies as needed. This will require being able to lift a minimum of 10 pounds.

6. Maintain positive customer focused relationship with co-workers, supervisor, agencies, general public and all other internal and external customers.

THE CONTRACTOR MUST:

1. Be responsible for payroll, taxes and insurance related to their employees.

2. Replace any employee deemed unsatisfactory within a forty-eight (48) hour period when requested by GSD.

3. Meet monthly at a specified time with GSD designated supervisory staff.

4. Provide services in accordance with all the provisions, terms, conditions, specifications and any subsequent modifications as outlined herein.

IV. Information for Offerors to Submit

COMPANIES WILL SUBMIT THE FOLLOWING INFORMATION WITH THEIR BID:

1. Company's Name
   Office Location
   Owner
   Telephone Number

2. A minimum o three (3) references where similar services were provided during the past two (2) calendar years. These references should reflect contracts which required the provision of 100 or more employees at one time.

YES

AMENDMENT #2

ACKNOWLEDGE RECEIPT OF THIS AMENDMENT PRIOR TO DATE AND TIME SPECIFIED IN THE SOLICITATION, OR AS AMENDED, BY ONE OF THE FOLLOWING METHODS: (A) BY SIGNING AND RETURNING ONE COPY OF THIS AMENDMENT WITH YOUR BID; (B) BY ACKNOWLEDGING RECEIPT OF THIS AMENDMENT ON EACH COPY OF THE OFFER SUBMITTED; OR (C) BY SEPARATE LETTER OR TELE-GRAM WHICH INCLUDES A REFERENCE TO THE SOLICITATION AND AMENDMENT NUMBER(S). FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO DATE AND TIME SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. IF, BY VIRTUE OF THIS AMENDMENT YOU DESIRE TO CHANGE AN OFFER ALREADY SUBMITTED, SUCH CHANGE MAY BE MADE BY LETTER OR TELEGRAM, PROVIDED SUCH LETTER OR TELEGRAM MAKES REFERENCE TO THE SOLICITATION AND THIS AMENDMENT AND IS RECEIVED PRIOR TO DATE AND TIME SPECIFIED.

The Invitation for Bid Solicitation **No. 05-S6796** for Contractor Labor Services for B&CB – is hereby amended to include the following information:

New Bid Opening date: _____ **New Posting Award date:**_____

Modifications to Bid:

1. On page 2, Maximum Contract Period, changed to read: Date of Award through 5 years.

   On page 13, Term/Option to Extend, Initial contract period, changed to read: Date of award through 1 year

2. On page 6, Part III, Scope of Work/ Specifications, Section: Part – Time Labor Services.

   In relation to the discussion at the pre-bid conference regarding the reduction of employees, the state is looking at cost savings measures, one of which may be a reduction of employees. At this time the degree of reduction, if any, is purely speculative.

3. On page 8, Part III, Scope of Work / Specifications, Section F, #3, and Part V. Qualifications, #1, is amended to read as follows:

   The successful contractor must establish an office once awarded for at least four (4) hours daily in an area serviced by the Columbia Bus System.

4. One page 9, Part III, Scope of Work / Specifications, Section I, #5, the amount of the Insurance has changed **from** $69.50 per month **to $93.46** per month.

5. One page 11, Part IV, Information for Offerors to Submit, #2, is amended

to read as follows:

(2.) References: Offeror shall provide contact information (including client name, dates and type of service, point of contact with telephone numbers, and other relevant information) for at least three (3) recent and relevant contracts for the same or similar services that were performed during the past two (2) calendar years.

6. On page 11, Part V, Qualifications, this section is amended to add the following:

(3) Minimum Experience Requirement: In order to be qualified for award, offeror must have placed, during the past two (2) calendar years, at least 100 employees at one time to a single client pursuant to a contract for similar services. Offeror shall submit information (including client name, dates and types of service, points of contact with telephone numbers, and other relevant information) sufficient to document that offeror meets this minimum experience requirement.

7. On page 15, under Note, last paragraph, change SLED Report to National Background Report.

Responses to Written Questions Asked at Pre-Bid Conference

1. **Question:** What constitution a S.C, Resident Vendor Preference?
Answer: The qualifications are found on the Material Management web site: www.state.sc.us/mmo section 11-35-1524 Resident vendor preference, item #6, a-d

2. Insurance company pricing on health insurance coverage fluctuates by age and sex.
Question: Can we get a census of the eligible employees by age and sex?
Answer: Custodial Operations: 135 females and 32 males, we do not ask for age.
Horticulture Operations: 9 males
Parking Operations: 5 Males and 1 female

3. **Question:** Who is the current vendor? (b.) What is the current pricing information including price per hour, extended price and total hours billed over the last year?
Answer: a. Kneece's Carolina Cleaning

b. FY 03-04 Total Cost $ 2,398,700.86
FY 03-04 Total Hours 273,028.31

4. **Question:** What are the specific payment terms?
Answer: The state responds with payment within 30 working days of the receipt of invoice by the approving official. Refer to Section 11-35-45 of the SC Code of Laws.

5. **Question:** What are the current hourly pay rates of the personnel in the current contract?
Answer: Hourly pay rates for Parking Contract employees are $6.44, $6.70 and $6.95. Range for all groups $ 5.40- $7.49.

6. **Question:** How long is the workday? (b.) Are there shifts (2nd & 3rd) employees needed?
Answer: a. **Parking Operations:** We have 7 Contract Parking Attendants working 6 hour shifts and 1 Contract Parking Attendant 8 hour shift and 2 contract Custodial employees working an 8 hour shift.
Custodial Operations: Normal workdays are 7:00 a.m. to 11:00 p.m. Shifts: 7:00

b. The key question the buyer must ask is, "Does the prospective contractor possess the adequate resources to bear on the entity's requirements, given other commercial and/or entity commitments?

Contractor Integrity

a. The prospective contractor must have a satisfactory record of integrity and business ethics.

- Have there been criminal violations by the company or its employees?
- Have affiliated or parent companies been guilty of wrongdoing?
- Are any subcontractors guilty of criminal violations?

b. The buyer must answer these questions in determining a firm's responsibility.

Applying Special Standards

a. For some acquisitions, it may be necessary to use special standards along with the general standards just discussed to determine a prospective contractor's responsibility. Special standards must be clearly stated in the IFB. Some examples are:

- Requirements for specialized technical experience or expertise.
- Requirements for specialized facilities, i.e., those handling foodstuffs, that must comply with strict sanitation codes.
- Written guarantees for continuous supplies of certain items or products.

b. Experience requirements must not be unduly restrictive, and the buyer must be willing to abide by them after the results of the bidding have been seen, e.g., the contractor has performed this

work before, or has manufactured a particular item for a minimum number of years.

c. New firms may also compete under special standards, especially if the firm's principal officers possess the requisite experience or expertise.

d. Special standards may also apply to subcontractors undergoing determinations of responsibility.

PREAWARD SURVEY

What are the procedures for requesting preaward surveys? The buyer may conduct a preaward survey and evaluation of a prospective contractor's capability to perform a proposed contract for the following reasons:

a. The information available is not sufficient to determine a contractor's responsibility.

b. The contractor has a record of poor past performance.

c. The buyer anticipates problems over the issue of competency.

d. Ordinarily, the buyer does not request a preaward survey for contracts valued at less than [$25,000] involving commercial products.

e. The greater the dollar value of the contract, the greater the detail in conducting the survey.

The Law

by Margaret E. McConnell

"Customer service" is a popular rallying cry for public purchasing. And it should be. Citizens expect more and more services from state and local governments and educational institutions. You—the public purchaser—are responsible for selecting and managing contractors that supply complex services and goods essential to sustaining high service levels.

Selecting the Best Supplier

It is up to you to choose a responsible vendor.

But you must step away from your chores every once in a while to examine the tools you have to deliver good service. One of those is the requirement that a vendor be "responsible" to qualify for contract award. Laws or policies define the term in various ways, but certain requirements are standard: One is that the vendor must have the capability, reliability and integrity to do the job.

Are you using this responsiblity tool to select the best vendor? Or are you assuming that, because a vendor has been around forever or a contractor to your public entity, it is responsible?

Don't make that assumption. A comfortable, familiar relationship alone isn't enough to satisfy your professional obligation to make sure that the vendor is capable, reliable and ethical.

Some public entities are lucky to have the resources to devote staff to scrutinizing vendors' backgrounds and maintaining good records of contractor performance. But even without that, you can define "responsibility" to meet the needs of a particular procurement and include the definition in the solicitation. Vendors then have to document, as part of the process, that they can meet the specific criteria you've established. Or routinely ask vendors to answer key questions on a form, such as whether they've been the subject of criminal investigations or given money to a public servant.

That's the practice of a public authority in New York City. It awarded a contract for painting to a vendor who'd answered "no" to those questions, even though the answers were really "yes." The authority didn't find that out until the work was done. The contractor sued the authority, because it refused to give the contractor the remaining payments owed under the contract.

The court sided with the authority. It said that the false statements prevented the authority from conducting a thorough investigation and caused it to award the contract to the wrong guy.

So, use the "responsibility" tool. It announces to both your internal customers and your vendors that you're serious about customer service. ■

Reed Rahn photo

Maggie McConnell

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I. Types of Responsibility Criteria

A. State Standards of Responsibility

1. Created by Regulation 19-445.2125

2. Character:

a. Regulation establishes flexible factors to be considered collectively in one overall determination of responsibility;

b. Regulation does not create fixed minimum requirements than can be evaluated on pass/fail basis

3. Regulations do not require separate determination of "financial responsibility." Financial resources but one of several factors to be considered.

B. Special Standards of Responsibility

1. Created by Solicitation

2. Character: Solicitation creates fixed minimum requirement that can be evaluated on pass/fail basis

3. A requirement in an RFP can only be characterized as a special standard of responsibility if it is (1) **specific**, (2) **objective**, and (3) **mandatory**. Must be mandatory and easily subject to pass/fail evaluation

II. Standard of Review

A. Arbitrary, Capricious, Clearly Erroneous, or Contrary to Law

See: § 11-35-2410

B. Same Standard Panel Applies to Evaluations

See Protest of First Sun EAP Alliance, Inc., Panel Case No. 1994-11 ("As the Panel ha[s] stated in previous cases, 'the Panel will not substitute its judgment for the judgment of the evaluators, or disturb their findings so long as the evaluators follow the requirements of the procurement code and the RFP, fairly consider all proposals, and are not actually biased.'") (quoting Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16)

C. Two Standards: one for factual issues and one for legal issues:

1. Factual issues are final unless clearly erroneous, arbitrary, or capricious - standard used in reviews of evaluators. See Protest of First Sun above.

2. Legal issues are final unless contrary to law - in other words, Panel says what the law is.

III. Panel's Jurisdiction Limited to Review of Procurement Officer's Determination

A. Protestant asks Panel to Decide if APS is responsible.

B. Panel does not have jurisdiction to determine whether APS is responsible. Determination of responsibility involves an exercise of discretion and business judgement that State must exercise

1. Code delegates business judgement to Procurement Officer

a. R.19-445.2125(D) requires that "procurement officer must be satisfied", not the CPO or the Panel.

b. § 11-35-2410 makes procurement officer's decision (not decision of Panel or CPO) final unless arbitrary ...

2. Panel has recognized that such discretion must be exercised by state, not Panel

a. Panel has expressly refused to re-evaluate proposals - even when the evaluation was arbitrary or capricious. See Protest of First Sun EAP Alliance, Inc., Panel Case No. 1994-11 ("The Panel will not re-evaluate and compare the professional qualifications of the offerors, and thus second guess the decision of the evaluators.")

b. Panel has expressly stated that "The determination of what is most advantageous to the state can only be determined by the State." Protest of Travelsigns, Case No. 1995-8.

3. Panel does not have time or resources to make independent determinations of responsibility

C. PANEL'S OBLIGATION IS TO DECIDE WHETHER PROCUREMENT OFFICER'S DETERMINATION WAS ARBITRARY, CAPRICIOUS, CLEARLY ERRONEOUS, OR CONTRARY TO LAW; NOT TO DECIDE WHETHER A VENDOR IS - IN FACT - RESPONSIBLE.

IV. How to Review Determination Regarding State Standards of Responsibility

ASK

1. Was the procurement officer arbitrary in making a determination based on the type, quality, and quantity of information available?

2. Was the procurement officer arbitrary in not requesting additional information from the vendor, i.e., did any information available contain "red flags" such that it would be arbitrary to decide that additional follow-up was not required?

3. Was the procurement officer arbitrary in concluding that the information at hand indicated that the contractor could, in fact, perform the contract?

4. Did the procurement officer apply the proper legal standard, i.e., did the procurement officer consider all the factors identified in the regulations?

5. Did the procurement officer have any bias for or against the offeror that would make the determination arbitrary?

REMEMBER

State not obligated to hire certified public accountants or forensic economists. Must be able to rely on properly trained procurement officers.

V. How to Review Determination Regarding Special Standards of Responsibility

A. Does the RFP create special standards of responsibility?

- A requirement in an RFP can only be characterized as a special standard of responsibility if it is (1) **specific**, (2) **objective**, and (3) **mandatory**. In other words, requirement must be mandatory and easily subject to pass/fail evaluation. Otherwise, not fair to hold vendors to the standard.

B. Was the procurement officer arbitrary in concluding that the requirement was met?

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, **and** the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:
(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;
(b) failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;
(c) failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization, and the bid carries such a signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;
(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:
(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, thereon, provided that the bidder states under oath that it received the amendment prior to bidding and that the bidder will stand by its bid price or,
(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the governmental body;
(e) failure of a bidder to furnish an affidavit concerning affiliates;
(f) failure of a bidder to execute the certifications with respect to Equal Opportunity and Affirmative Action Programs;
(g) failure of a bidder to furnish cut sheets or product literature;
(h) failure of a bidder to furnish certificates of insurance;
(i) failure of a bidder to furnish financial statements;
(j) failure of a bidder to furnish references;
(k) failure of a bidder to furnish its bidder number; and
(l) notwithstanding Section 40-11-180, the failure of a bidder to indicate his contractor's license number or other evidence of licensure, provided that no contract shall be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.